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No. 02-970

IN THE

Supreme Court of the United States

MGM GRAND HOTEL, LLC,

Petitioner,

v.

MEDINA RENE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page ii of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent Rene misstates the *en banc* Ninth Circuit's opinions and retreats from the position he took in the district court and court of appeals. Rene now recites the prudential considerations that opponents of *certiorari* typically recite when they seek to discourage review. But the recitation does not make them so. In fact a ripe, important question of law is presented clearly for review.

I. RENE'S CURRENT POSITION DIFFERS FROM THAT WHICH HE TOOK BEFORE

Rene now contends that his theory of the case is that he was harassed "based on [him] being male." (Opp. at 1.) Yet he concedes elsewhere that he had contended all along that he was "singl[ed] out . . . '*in comparison to other men*'" — a theory that by definition is not *gender* discrimination. (Opp. at 11.) In the district court, Rene conceded that "The question raised by this [summary judgment] motion is whether the conduct alleged by Rene is prohibited by Title VII even though it was directed at Rene *because of his sexual orientation*." (Rene's Opposition to Summary Judgment at 3; emphasis added.) Later, in seeking *en banc* review in the Ninth Circuit, Rene argued, "[I]t is time for the Ninth Circuit to revisit its view of gay and lesbian rights. . . . Times have changed, society has changed, and hopefully the law has changed too . . . ." (Petition for Rehearing and Suggestion for Rehearing *En Banc* at 12.) The dissenting judges in the court of appeals unerringly quoted Rene's deposition testimony, which unambiguously alleged "sexual orientation" as Rene's theory of the case. (Pet. App. 33a-34a; *see* Pet. 32a n.8.) Rene's Opposition

thus departs markedly from how he articulated his position in the lower courts.[1]

Thus, Rene's contention that he is not presenting a sexual-orientation discrimination case is demonstrably wrong.

II. THE NINTH CIRCUIT *EN BANC* DEPARTED FROM *ONCALE* AND EXPLAINED HOW, THROUGH ARTFUL PLEADING, SEXUAL ORIENTATION CAN BE ENGRAFTED ONTO TITLE VII

The Ninth Circuit *en banc* revived Rene's claim by creating new law. The plurality held that Title VII automatically provides a remedy for offensive touching of the human body. (Pet. App. 5a-6a, 8a-9a.)[2] Most states provide a remedy (either statutory or in tort) for such conduct, but Title VII does not. This Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75,

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1. Rene's change of position will not be recognized. As this Court reiterated, where "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This rule "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (citation omitted). The rule serves the "integrity of the judicial process" by preventing parties from "playing fast and loose with the courts" based on the "exigencies of the moment." *Id.* (citations and internal quotation marks omitted).

2. Rene contends that a Title VII claim would not "exist in every case in which an employee suffers a physical assault directed at a sexually identifiable part of the body" (Opp. at 3), but neither he nor any of the court of appeals' opinions explains why that is so, let alone what the line of demarcation would be.

80 (1998), emphasized no Title VII remedy exists unless the conduct is "based on . . . sex." The term "sex" in Title VII means gender. *Id.* at 79. Deplorable conduct, without more, is not actionable. Except where substantial *gender*-based disparate treatment exists, Congress thus far has left it to the states to play the role of workplace-conduct monitor. The plurality here dispensed with the gender requirement that *Oncale* reiterated was essential under Title VII.[3]

The concurring opinion sweeps even more broadly. It significantly extended prior law in grounding its decision under the rubric of "stereotyping." Rene contends that no circuit conflict exists on this issue. (Opp. at 14.) It is true that no circuit has taken issue with this Court's general dictum in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), that sexual stereotyping in some circumstances can be a form of gender discrimination. In fact, however, the circuit cases after *Price Waterhouse* present the ultimate conflict, because (as shown in the petition) the cases: (i) reach diametrically opposite results, depending upon whether the reviewing court pigeonholes the case as one alleging "sexual orientation" discrimination (plaintiff loses) or "stereotyping" (plaintiff wins, or at least gets to trial); and (ii) provide no rule for deciding which pigeonhole a case belongs in. The facts of same-sex harassment

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3. Rene contends (Opp. at 8-9 n.5) that his deposition admission that the harassment was based on the fact that he was gay "no more defeats his claim . . . than would the answer of a female employee that she thinks her [male] supervisor fondled her because she had red hair and he likes redheads." Not so. The "redhead" example is a classic example of harassment based on gender. That a sexual harasser elects to demand sexual favors from a subset of the female population rather than all of it does not make the demand for sexual favors any less based on the female subordinate's gender.

cases are distressingly similar: the same touching, the same words. Yet some plaintiffs win, and some plaintiffs lose. The only difference is how the plaintiff's lawyer pleads the case.[4]

The proper role for the "stereotyping" doctrine is that stated in the petition. Where an employer penalizes employees or applicants of one gender for work-related behavior that is tolerated or praised in the other gender, then cognizable gender discrimination exists. For example:

- If a man is praised for being "aggressive," but a woman is derided as "pushy," gender discrimination exists.

- If a man uses profanity on the job with impunity, but a woman is punished for using the same words, gender discrimination exists.

- If a man who leaves work at 4 p.m. to coach Little League is praised for having "good family values," but a woman who leaves early to pick up the carpool is said to "lack commitment to her job," gender discrimination exists.

But it is a huge leap from examples like these to the unbounded holding of the Ninth Circuit's concurring judges. The concurring opinion charts a path in which substantially

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4. Or, as here, how deferential a court is willing to be in construing the pleading. Here, for example, the concurring judges were forced to assert that "gender stereotyping . . . is what Rene *meant*" to say when he was alleging sexual orientation discrimination. (Pet. App. 13a-14a n.2 (Pregerson, J., concurring; emphasis added).) Rene invites this Court's attention to his Complaint (Opp. at 2 n.3), and the Court should accept the invitation. Nothing in the Complaint even mentions the term "gender stereotyping" (or any other form of stereotyping).

every sexual orientation case can be repackaged to make it cognizable, notwithstanding Congress' choice to date that sexual orientation is not a status protected under Title VII. While Rene now purports to say that the *en banc* opinion did not decide very much (Opp. at 11, 13), in fact it was a *tour de force*. It explained how a plaintiff through artful pleading can circumvent the policy choice that Congress has made (and repeatedly reaffirmed, *see* Pet. at 10), in leaving to the states (in their fair employment practices statutes and common-law torts, such as battery) to provide a remedy for sexual orientation discrimination and harassment.

Rene contends that MGM Grand takes segments of the court of appeals' analysis out of context and ignores "the entirety of the opinion." (Opp. at 8.) But it is precisely "the entirety of the opinion" that calls for review. Because any sexual harassment claim can be repackaged as an allegation that the plaintiff did not conform to at least one gender stereotype (that of being sexually attracted to the opposite sex), the concurring judges have charted a path for recharacterizing every sexual orientation case to make it cognizable.[5] The plurality's opinion accomplishes the same thing, because virtually every same-sex sexual harassment case involves the same touchings, the same words, the same epithets. If this Court's teaching in *Oncale* means anything, it means that the courts must decide whether (rather than presume that) a claim is "based on" gender.[6]

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5. Rene's *amicus* (Bay Area Lawyers for Individual Freedom) explicitly argued in the Ninth Circuit (Brief at 2, 3, 6, 10) that "discrimination based on sexual orientation" by its nature is inherently "Discrimination 'because of . . . sex'."

6. Hence the flaw in Rene's contention (Opp. at 11-12, 13) that the case is unworthy of review because *en banc* court took

(Cont'd)

III. NO PRUDENTIAL CONSIDERATION IMPEDES REVIEW

Rene recites the prudential considerations that those opposing *certiorari* always recite: He contends that the case is factually oriented, and the facts are in dispute. In fact the opposite is true. Rene's factual contentions are assumed to be true in every respect. The critical undisputed facts are:

- Rene was openly gay. (Pet. App. 2a.)
- Rene was masculine and conformed to the male stereotype in every respect except sexual orientation. (Pet. App. 32a.)
- Rene experienced unwanted physical touching and stereotypical verbal comments mocking him despite his masculine appearance and demeanor. (Pet. App. 2a.)

There simply is no factual dispute to resolve.

IV. MGM GRAND IS NOT CONTENDING THAT GAYS AND LESBIANS CANNOT BRING SEXUAL HARASSMENT CASES

Rene's final approach is a transparent straw man. He alleges that MGM Grand's position is "that he should . . . be precluded from [suit] simply because he is gay."

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different analytical paths to its result. The court was not at all fractured in its *result*: the path to pleading cognizable sexual-orientation cases now is clearly charted.

(Opp. at 4; *see also* Opp. at 2 n.3 ("his sexual orientation [should] not *defeat* his . . . claim"), 12 ("Respondent [should not be deprived] — solely because he is gay — of the same opportunity any other Title VII plaintiff has.").)

MGM Grand is not contending that gay plaintiffs cannot sue for sexual harassment. Of course they can — but under the rules established in *Oncale.* Rene's sexual orientation is neither protected nor disfavored under Title VII. Congress' choice to date has been to outlaw gender-based harassment, and Rene's case simply was not based on his gender (male), but rather because he was "singl[ed] out . . . '*in comparison to other men.*'" (Opp. at 11; emphasis added.) That is sexual orientation discrimination, not gender discrimination. While that surely "is a noxious practice, deserving of censure and opprobrium," *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999), Congress' choice thus far has been to leave it to the states to administer the censure and opprobrium.

Perhaps the day will come in which Congress makes a different choice. Until that day comes, the Ninth Circuit's *en banc* opinion effectively amends Title VII in the Ninth Circuit and creates a conflict which this Court should resolve.

CONCLUSION

Like cases should be decided alike. The Ninth Circuit's decision here treats as triable a sexual-orientation contention that other circuits would reject. The plurality ignored *Oncale*, and the concurring judges have extended the "stereotyping" rationale well beyond anything contemplated in the dictum in this Court's plurality opinion in *Price Waterhouse*. MGM Grand therefore respectfully suggests that the petition should be granted.

Respectfully submitted.

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